

FILE COPY

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF
THE APPLICATION FOR A LICENSE
TO **PRACTICE** MEDICINE AND SURGERY OF

Case #9012211MED

KAZI K. BAKHT, M.B.B.S.,

Applicant

FINAL DECISION AND ORDER

The parties to this proceeding for the purposes of Wis. Stats. sec. 227.53 are:

Kazi K. Bakht, M.B.B.S.
12 **Charles** Street, #6
St. John, N.B., E2L 3L9

Medical Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935

The above-captioned matter was commenced as a class 1 proceeding within the meaning of Wis. Stats. sec. 227.01(3)(a), by the filing of a Notice of Hearing on January 23, 1991. The Notice of Hearing indicated that the purpose of the proceeding was to provide the applicant, Kazi K. Bakht, M.B.B.S., a hearing upon the following action taken by the Medical Examining Board:

“On May 23, 1990, the (board) denied your application for a license to practice medicine and surgery on the grounds that you failed to achieve a passing grade on the oral examination and notified you of this decision by a letter dated June 11, 1990....**The** issue raised for consideration at the hearing on the denial of your application for licensure is:

"Did you provide minimally competent responses to questions presented at your oral examination on May 23, 1990, necessary to achieve a passing grade on this oral examination?"

The hearing was originally scheduled to be held on February 22, 1991, but was adjourned to the date held upon the request of the applicant. The hearing was held on May 3, 1991 in Room 133 at 1400 East Washington Avenue, Madison, Wisconsin. The applicant, Kazi K. Bakht, appeared personally and without legal counsel. Arthur K. Nexton appeared as the attorney for the Department of Regulation and Licensing, Division of Enforcement.

The Administrative Law Judge filed his Proposed Decision in the matter on July 31, 1991, and the board considered the matter at its meeting of August 22, 1991. Based upon all the evidence of record herein, the Medical Examining Board makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Kazi K. Bakht, M.B.B.S., (Bakht) has applied for a license to practice medicine and surgery in the State of Wisconsin.
2. Bakht was required to pass an oral examination in order to receive a license to practice medicine and surgery, pursuant to Wis. Stats. sec. 448.05(1)(c), and Wis. Adm. Code sec. Med 1.06(1)(a).
3. The purpose of the oral examination is to test the applicant's knowledge of the practical application of medical principles and techniques of diagnosis and treatment, judgment and professional character and are scored pass or fail, pursuant to Wis. Adm. Code sec. Med 1.06(4).
4. Bakht took the oral examination before the Medical Examining Board on May 23, 1990. Subsequent to the examination, Bakht was notified that the board had denied his application for a license to practice medicine and surgery upon the basis that he failed to achieve a passing grade on the oral examination.
5. During the oral examination given on May 23, 1990, Bakht failed to give minimally competent responses in the following subject areas:
 - A. Diagnostic approach prior to and during surgery, regarding a woman with abdominal swelling.

- B. Performing gastroscopic procedure without prior experience.
- C. Initial use of myelogram in diagnosing patient complaining of low back pain.

6. Bakht failed the oral examination given by the Medical Examining Board on May 23, 1990.

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this proceeding pursuant to Wis. Stats. secs. 448.02 and 448.06(2), and Wis. Adm. Code ch. Med 1.

2. The Medical Examining Board may deny an application for a license to practice medicine and surgery on the basis of the failure of an applicant to achieve a passing grade in the required examinations, pursuant to Wis. Stats. sec. 448.06(2).

ORDER

NOW, THEREFORE, IT IS ORDERED, that the application of Kazi K. Bakht, M.B.B.S., for a license to practice medicine and surgery in the State of Wisconsin shall be, and hereby is, denied.

EXPLANATION OF VARIANCE

The board has accepted each of the administrative law judge's Findings of Fact and Conclusions of Law, with one exception. At subparagraph 5.D. of the Findings of Fact, the ALJ found that Dr. Bakht failed to give a minimally competent responses in a subject area involving "use of general anesthetics upon seven year old with minor fracture." At the examination, Dr. Bakht was asked the following questions and gave the following answers:

Q. How generally would you treat somebody that is seven years old that has a Colles' fracture?

A. Well, Colles' fractures or just I shall reduce it down to anesthesia and put a plaster and sling.

Q. What kind of anesthesia would you use?

A. Really, general anesthetics, because a child you cannot manage without general anesthesia.

Dr. Reuben J. Adams, the department's expert witness, was asked his opinion of Dr. Bakht's response, and answered as follows:

A. Once again, I'm not an orthopedist so I'm kind of commenting, you know, off the top of my hat so to speak. I have had a fair amount of secondhand experience with that in that our surgeon at our local clinic handles these routinely, and I can't recall him ever on a child or even on an adult having to resort to a general type of anesthetic for this type of fracture. he generally goes with a local type of block and has gotten by very nicely.

Q. Now 7 year olds are of course notoriously restless and full of energy. Can you think of a situation in which a child like that or do you think that children like this should routinely require general anesthesia to calm them down so that the doctor can work on them without having them wiggle all over the place?

A. I don't think this is routinely needed. There are going to be some children where that is going to be the only method that you're going to get the proper anesthesia, but I think probably 99 -- 95 to 99 percent of the kids can get by with local anesthesia.

Dr. Bakht's subsequent testimony on this subject included the following:

Now about this fracture, Colles' fracture. I have done orthopedic work. I have done anesthetic work. I have not seen anybody doing reduction of Colles' fracture under general anesthetics. I've done it myself. I have seen it myself. I have done orthopedics during the period of 1965 to '83, off and on in England, and I have done anesthetics during the period of '74 to '83, off and on in England. I haven't seen anybody doing reducing of Colles' fracture under local anesthetics. So it's a varied opinion. What I said that for a child of 7 years old, general anesthetic is the procedure of choice and I stand by it.

Certainly general anesthesia is not always required in reducing a Colles' fracture in a seven year old patient, and the board does not deny the possibility that Dr. Adams' colleague may prefer and have satisfactory results utilizing local anesthetics in that situation. However, the board also credits Dr. Bakht's testimony, and agrees

that general anesthetics are utilized more often than not in reducing Colles' fractures in children in the age group in question. The board therefore finds that Dr. Bakht's responses in this area of his oral examination demonstrated minimal competence, and subparagraph 5.D. of the Findings of Fact must therefore be stricken.

Dated this 4 day of September, 1991.

STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

by Michael P. Mehr M.D.
Michael P. Mehr, M.D.
Secretary

WRA:BDLS2:732

NOTICE OF APPEAL INFORMATION

**(Notice of Rights for Rehearing or Judicial Review,
the times allowed for each, and the identification
of the party to be named as respondent)**

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Medical Examining Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Medical Examining Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Medical Examining Board.

The date of mailing of this decision is September 9, 1991.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (c). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

227.52 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employee trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review, by the labor and industry review commission, and except as otherwise provided by law.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) 1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board or the consumer credit review board, the credit union review board or the savings and loan review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par (b) 1 to 4.

2. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency.

3. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59 (6) (b), 182.70 (6) and 182.71 (5) (g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions

for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents.

(c) A copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party's attorney of record. A court may not dismiss the proceeding for review solely because of a failure to serve a copy of the petition upon a party or the party's attorney of record unless the petitioner fails to serve a person listed as a party for purposes of review in the agency's decision under s. 227.47 or the person's attorney of record.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review board) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.

BEFORE THE STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

IN THE MATTER OF THE APPLICATION	:	
FOR A LICENSE TO PRACTICE	:	NOTICE OF FILING
MEDICINE AND SURGERY OF	:	PROPOSED DECISION
	:	9012211MED
KAZI K. BAKHT, M.B.B.S.,	:	
APPLICANT.	:	

TO: Kazi K. Bakht, M.B.B.S.
12 Charles Street, #6
St. John, N.B., E2L 3L9
Certified P 568 984 498

Arthur K. Thexton
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708


PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Medical Examining Board by the Administrative Law Judge, Donald R. Rittel. A copy of the Proposed Decision is attached hereto.

If you have objections to the Proposed Decision, you may file your objections in writing, briefly stating the reasons, authorities, and supporting arguments for each objection. Your objections and argument must be received at the office of the Medical Examining Board, Room 176, Department of Regulation and Licensing, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before August 14, 1991. You must also provide a copy of your objections and argument to all other parties by the same date.

You may also file a written response to any objections to the Proposed Decision. Your response must be received at the office of the Medical Examining Board no later than seven (7) days after receipt of the objections. You must also provide a copy of your response to all other parties by the same date.

The attached Proposed Decision is the Administrative Law Judge's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision together, with any objections and arguments filed, the Medical Examining Board will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 31st day of July, 1991.


Donald R. Rittel
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE APPLICATION	:	
FOR A LICENSE TO PRACTICE	:	
MEDICINE AND SURGERY OF	:	PROPOSED DECISION
	:	(Case No. 9012211MED)
KAZI K. BAKHT, M.B.B.S.,	:	
APPLICANT.	:	

The parties to this proceeding for the purposes of Wis. Stats. sec. 227.53, are:

Kazi K. Bakht, M.B.B.S.
12 Charles Street, #6
St. John, N.B., E2L 3L9

Medical Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

The above-captioned matter was commenced as a class 1 proceeding within the meaning of Wis. Stats. sec. 227.01(3)(a), by the filing of a Notice of Hearing on January 23, 1991. The Notice of Hearing indicated that the purpose of the proceeding was to provide the applicant, Kazi K. Bakht, M.B.B.S., a hearing upon the following action taken by the Medical Examining Board:

"On May 23, 1990, the (board) denied your application for a license to practice medicine and surgery on the grounds that you failed to achieve a passing grade on the oral examination and notified you of this decision by a letter dated June 11, 1990....The issue raised for consideration at the hearing on the denial of your application for licensure is:

"Did you provide minimally competent responses to questions presented at your oral examination on May 23, 1990, necessary to achieve a passing grade on this oral examination?"

The hearing was originally scheduled to be held on February 22, 1991, but was adjourned to the date held upon the request of the applicant. The hearing was held on May 3, 1991 in Room 133 at 1400 East Washington Avenue, Madison, Wisconsin. The applicant, Kazi K. Bakht, appeared personally and without legal counsel. Arthur K. Thexton appeared as the attorney for the Department of Regulation and Licensing, Division of Enforcement.

Based upon the record herein, the administrative law judge recommends that the Medical Examining Board adopt as its final decision in this case the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Kazi K. Bakht, M.B.B.S., (Bakht) has applied for a license to practice medicine and surgery in the State of Wisconsin.

2. Bakht was required to pass an oral examination in order to receive a license to practice medicine and surgery, pursuant to Wis. Stats. sec. 448.05(1)(c), and Wis. Adm. Code sec. Med 1.06(1)(a).

3. The purpose of the oral examination is to test the applicant's knowledge of the practical application of medical principles and techniques of diagnosis and treatment, judgment and professional character and are scored pass or fail, pursuant to Wis. Adm. Code sec. Med 1.06(4).

4. Bakht took the oral examination before the Medical Examining Board on May 23, 1990. Subsequent to the examination, Bakht was notified that the board had denied his application for a license to practice medicine and surgery upon the basis that he failed to achieve a passing grade on the oral examination.

5. During the oral examination given on May 23, 1990, Bakht failed to give minimally competent responses in the following subject areas:

- A. Diagnostic approach prior to and during surgery, regarding a woman with abdominal swelling.
- B. Performing gastroscopic procedure without prior experience.
- C. Initial use of myelogram in diagnosing patient complaining of low back pain.
- D. Use of general anesthetics upon seven year old with minor fracture.

6. Bakht failed the oral examination given by the Medical Examining Board on May 23, 1990.

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this proceeding pursuant to Wis. Stats. secs. 448.02 and 448.06(2), and Wis. Adm. Code ch. Med 1.

2. The Medical Examining Board may deny an application for a license to practice medicine and surgery on the basis of the failure of an applicant to achieve a passing grade in the required examinations, pursuant to Wis. Stats. sec. 448.06(2).

ORDER

NOW, THEREFORE, IT IS ORDERED, that the application of Kazi K. Bakht, M.B.B.S., for a license to practice medicine and surgery in the State of Wisconsin shall be, and hereby is, denied.

OPINION

The applicant, Kazi K. Bakht, M.B.B.S., was denied a license to practice medicine and surgery in the State of Wisconsin on the basis that he failed to successfully pass the oral examination administered by the Medical Examining Board on May 23, 1990. Bakht requested a hearing upon the denial, and this proposed decision is based upon the hearing held.

This action is designated as a "class 1 proceeding", which is described in Wis. Stats. sec. 227.01(3)(a), as one in which the Medical Examining Board... "acts under standards conferring substantial discretionary authority on the agency." Such discretion is essentially based upon the premise that one of the primary purposes for the legislative creation of the board is to assure the public that its licensees are competent to perform professional services at a minimal standard. The granting of a professional license constitutes an assurance to the public of competency. See, Strigenz v. Department of Regulation and Licensing, 103 Wis. 2d 281, 287 (1981).

It is my opinion, based upon the record made in this proceeding, that Bakht failed to provide minimally competent answers to questions posed during the oral examination, and that the board properly exercised its discretion to deny his application for licensure.

The primary issue to be determined in this case is the sufficiency and appropriateness of Bakht's answers to four of the hypothetical diagnostic and treatment questions presented by the board during the oral examination. In this instance the applicant testified at the hearing that he believed his answers to be correct. On the other hand, the state presented the expert testimony of Dr. Reuben J. Adams that they were not. Each of the four question areas will be discussed separately.

Bakht further challenged his denial on the basis that the transcript of the oral examination was inaccurate and that the pass/fail grading system resulted in his arbitrarily being denied licensure. These claims will also be considered.

FEMALE WITH SWELLING IN ABDOMEN

The applicant was asked at his oral examination as to how he would proceed regarding a woman who presented with a swelling in her abdomen. Bakht responded that he would initially perform a physical examination, history, and obtain information as to whether or not she had had any abnormality in childbirth. He then stated that his first test would be to "...do a laparoscopy before opening up her abdomen." (Ex. 1, p. 1).

The state's initial criticism of applicant's responses at the oral examination concerns his statement that the performance of a laparoscopy would be his initial test upon the patient. Dr. Adams testified that laparoscopy is a surgical procedure, thus posing some risk to the patient, and that prior to any consideration of surgery the use of non-invasive tests such as a CAT scan, MRI scan, or ultrasound needs to be utilized in order to gain additional information. (Trans., pp. 15-16).

The applicant defended his initial use of a laparoscopy by testifying that it was a minor invasive procedure which involved two "nicks" to the abdomen, the first in order to insert gas into the abdomen to enlarge the area, and the second for the insertion of a laparoscope in order to observe the mass. (Trans., p. 37).

However, Bakht did not testify as to why he believed it medically appropriate to immediately proceed to a laparoscopy, when safer and non-invasive procedures are available for obtaining information on the abdominal mass. One must conclude there are none. Dr. Adams testified:

"Q. Are there circumstances under which a laparoscopy would be done as the first test of choice in this situation?

"A. None that I can think of." (Trans., p. 16).

The fact that a laparoscopy may be a relatively minor surgical procedure does not make it an appropriate initial test.

The board then questioned Bakht regarding the procedure he would pursue after performing a laparoscopy. The applicant replied that he would open the abdomen and determine whether the mass was malignant or benign by noting whether it was "very hard and infiltrated", indicating malignancy, or "cystic", thus benign. If found to be cystic, he indicated he would drain the cyst and take it out along with the ovary and tubes on the affected side.

Dr. Adams testified that the applicant's described approach was not appropriate:

"A. ...(T)he first thing that should be done is to try to establish a diagnosis and this would best be accomplished perhaps by a frozen section. This would allow the surgeon to have some idea if it's malignant or benign, and then he could make, you know, further plans as to what surgical procedure should be done at that time, whether it involved just taking out one ovary and tube or it involved taking out the uterus and the other ovary and tube along with the affected side....

"Q. Well, before we go on further. Doctor, would you regard this testing to or examination to determine whether the mass is malignant or benign to be very important or moderately important or relatively unimportant in the treatment of the patient?

"A. I think it's very important.

"Q. And is it important to do while the patient is on the operating table?

"A. I would think so, yeah, because that would determine what additional things you might have to do at the time of that initial surgery." (Trans. pp. 17-18).

It is clear that the diagnostic techniques and procedures described by the applicant, consisting primarily of mere observation, are not appropriate to adequately determine whether the mass is malignant or benign, which thereby determines the resultant surgical intervention to be performed.

B. PERFORMANCE OF GASTROSCOPY

Bakht was next asked how he would approach a 43 year old male who complained of weakness, shortness of breath, an immediate quite black bowel movement, and whose pulse was 100, blood pressure 120/80 and respiration rate 28. It appears that the applicant appropriately responded that the presenting problems indicated that there was bleeding within the patient and that he would attempt to locate the point of hemorrhaging. He stated that he would attempt to determine whether there was any acute emergency situation and then perform a gastroscopokasis.

Upon further questioning, he indicated that he, personally, would perform the gastroscopic examination even though he had never performed one, since he had "seen plenty". (Ex. 1, p. 5).

The basic concern with the applicant's response here is his indication that he would perform a gastroscopy, even though he apparently had never performed one. Dr. Adams took objection to this approach, as follows:

"...(A) gastroscopy is a fairly, you know, benign type of procedure, but it does require I think particularly in a sick person who might actively be bleeding to have some degree of experience with it. If there is a lot of active bleeding going on, it is sometimes, you know, very difficult to identify the exact site or get the information that you need, and I think in this scenario it requires somebody who's done a lot of them frequently and recently. It isn't just something you'd, you know, want to, you know, do on a piecemeal basis or on an intermittent basis." (Trans., pp. 20-21).

In my opinion, Bakht's statement that he would personally perform the gastroscopy, when he admitted that he had no prior experience in conducting one, was a factor which the board could take into consideration when determining that the applicant had not passed the oral examination.

C. USE OF MYELOGRAM

The third area of concern involves the applicant's response to questioning regarding his diagnostic approach to a 55 year old male who had come into an emergency room complaining of having awakened during the night with a sudden and severe onset of low back pain.

Bakht appropriately indicated that he would query the patient regarding any history of such pain or recent trauma or straining in lifting. If the patient gave negative responses to these questions, the applicant stated at his examination:

"...(W)ell, in that case I have got only one thing to do, do (a) myelogram." (Ex. 1, p. 7; Trans., p. 10).

The state has two major arguments regarding the adequacy of this response. The first is the assumption that the patient's problem is necessarily related to the spinal cord, and the second concerns the immediate employment of a myelogram. Dr. Adams' testimony took issue with the applicant's response, as follows:

"First of all, the ordering of a myelogram presumes that you are dealing with a spinal cord problem. I don't think from this history that I can establish that that's exactly the problem going on. The scenario is you've got a guy who wakes up in the middle of the night with fairly severe low back pain. And I would be worried more of something else going on, that would be nonmusculoskeletal such as a ruptured abdominal aneurysm, perforated viscus, a kidney stone, something like that, before I would worry about the spinal cord as the source of the pain. I also think that with our modern techniques that a CAT scan or an MRI of the spinal cord could be obtained which is a much less invasive procedure than a myelogram and give the physician much more information." (Trans., p. 22).

It appears clear that from a diagnostic standpoint the applicant did not consider non-spinal cord related problems of the patient which could have induced the patient to visit the emergency ward. Given the lack of history related by the 55 year old patient regarding previous back problems, it would also seem clear that an exploration of other causes for the sudden pain would be in order.

Furthermore, Bakht's response during his oral examination that he would have proceeded directly to a myelogram, without pursuing non-invasive procedures such as a CAT scan or MRI, is inappropriate. The applicant conceded as much during the hearing by claiming that he only would have performed a myelogram following a physical examination, which would have included non-invasive diagnostic testing procedures. (See, e.g., Trans., pp. 28-31). The problem here is that he did not give that response during his

oral examination before the board. Rather, he recognizes a non-invasive approach only after the error in his test response was testified to by the state's expert at the hearing.

In my opinion, the board was clearly justified in determining that the applicant did not provide a minimally competent response to this question at the time of the examination.

D. USE OF GENERAL ANESTHESIA ON 7 YEAR-OLD FOR MINOR FRACTURE

The applicant was asked at his oral examination what type of anesthesia he would employ in treating a seven year old with a Colles' fracture, which essentially is a fracture occurring just above the wrist. Bakht's response was that he would use "...general anesthetics, because a child you cannot manage without general anesthetics." (Ex. 1, p. 7).

The state strongly disagreed with the applicant's response that general anesthesia was necessary in all such situations. Dr. Adams testified as follows:

"A. I don't think this is routinely needed. There are going to be some children where that is going to be the only method that you're going to get the proper anesthesia, but I think probably 99--95 to 99 percent of the kids can get by with a local anesthetic.

"Q. Is there a greater danger presented to a patient from general anesthesia than from a local?

"A. Much greater danger. I don't think there's any question about that....Once again, you are--with general anesthesia you are essentially putting the patient under and putting them out and you've got the risks of intubation. You've got the risks of not waking up from the gases....(Intubation) can traumatize the airway or perforate the airway or traumatize the vocal cords or traumatize the mouth.... (With) general anesthetic you are putting the patient out which means you are controlling his breathing and you are administering him, you know, gases or other types of anesthetics that, you know, from which he might not wake up. Then you've got the problem with the recovery following the anesthetic...." (Trans., pp. 24-25).

Given the obvious dangers posed through the use of general anesthetics as compared to local anesthetics, it appears clear that a local anesthetic would be viewed as far preferable to a minimally competent physician in this state in confronting minor fractures. The applicant's opinion that all 7 year olds are unmanageable without a general anesthetic in such situations is not consistent with the testimony regarding practice standards in this state. In my opinion, the board was correct in determining that Bakht failed to give a minimally competent answer to this question.

OTHER ISSUES: TRANSCRIPT AND PASS/FAIL GRADING

At the hearing, Bakht also challenged the denial on the basis that the written transcript of the examination, Exhibit 1, was incomplete and inaccurate. The transcript indicates that the audio tape broke during the examination and that it was necessary to cut the beginning off in order for it to be transcribed. The transcript also contains a few transcribing errors, primarily concerning medical terminology.

However, such transcription errors do not establish that the board's initial action of denial was erroneous. The board's determination was made on the day of the examination and in consideration of Bakht's oral presentation, not upon an inaccurate transcript.

Furthermore, Bakht corrected all of the errors he believed to be present in the transcript at the hearing, and was able to state the board's first question which was missing from the tape and, thus, the transcript. (Trans., pp. 6-13). Accordingly, the hearing, this decision, and the final decision by the board have been and will be based upon an accurate account of the questions and answers given during Bakht's oral examination, the previous problems with the tape and transcript notwithstanding.

Bakht also challenges the board's action upon the basic argument that grading the oral examination upon a pass/fail basis resulted in an arbitrary decision to give him a failing grade. He claims that a more objective scoring system should be employed.

In order to accept this argument, it would need to be found that the board does not have the authority to grade the examination on a pass/fail basis, or that in so grading the applicant's responses it arbitrarily chose to fail him. Neither proposition can be accepted.

First, there is no prohibition in any statute preventing the use of a pass/fail criterion upon a licensing examination. In this instance the board has promulgated a rule, which has the effect of law, specifically requiring that the oral examination be graded upon a pass/fail basis. I am required to take official notice of this requirement [see, Wis. Stats. sec. 227.45(4)], and have no legal authority to find it invalid.

However, the applicant is correct in his assertion that licensing examinations may not be arbitrarily prepared or graded, although I do not find that to have occurred in this case. Wis. Stats. sec. 440.07(1), requires that professional licensing examinations, including the oral examination at issue here:

"...(must) reasonably relate to the skills likely to be needed for an applicant to practice in this state at the time of examination and shall seek to determine the applicant's preparedness to exercise the skills."

Similarly, the board's rule provides that:

"...The purpose of the oral exams is to test the applicant's knowledge of the practical application of medical principals and techniques of diagnosis and treatment, judgment and professional character and are scored pass or fail." Med 1.06(4).

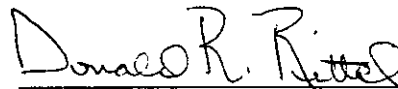
A review of the examination questions posed in this case substantiates that they were specifically and relevantly geared toward assessing professional competency, as required in the above laws.

Furthermore, there is nothing in this record tending to suggest that the board's decision to give the applicant a failing grade was a product of mere whim or arbitrary decision-making. There was a rational and reasoned basis for its determination; that being, as discussed above, the giving of several inappropriate answers regarding proper diagnostic and treatment techniques, thereby failing to satisfactorily demonstrate a possession of the knowledge required of minimally competent physicians in this state.

In my opinion, based upon the responses provided by Bakht at the oral examination, the board properly exercised its discretion to deny his application for a license to practice medicine and surgery.

Dated: July 31, 1991.

Respectfully submitted,



Donald R. Rittel
Administrative Law Judge

BDLS2-621